APPEAL NO. 93167

On January 29, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues determined at the contested case hearing were whether the claimant, Isaac Hurts (the appellant in this appeal), sustained a hand injury as a result of his on-the-job injury of March 28, 1991; whether claimant had reached maximum medical improvement (MMI) and, if not, if he still had disability; and whether claimant's impairment rating (and underlying MMI) assessed by his treating doctor in March 1992 had become final because not appealed in 90 days, as required by Tex. W. C. Comm'n Rules, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5).

The hearing officer determined that claimant's hand condition was related to and caused by his on-the-job injury, but that his certification of MMI and impairment rating became final because they were not timely disputed.

The claimant has appealed, arguing that he has not reached MMI and that his treating doctor has now assessed an impairment rating in the range of 20%. He argued that the attorney who represented him at the time he was adjudged to have reached MMI was to "take care of everything." No response has been filed.

DECISION

After reviewing the record, we reverse and remand the decision of the hearing officer.

The carrier, although notified of the contested case hearing, did not attend, and the hearing went forward without it. The claimant testified that he was injured on (date of injury) (not March 28, 1991, as stated on the benefit review conference report). He had been working for two to four weeks for (employer), when a piece of scaffolding tubing fell from a height of about eight feet and hit him on the head. Claimant was wearing a hard hat at the time. On April 8, 1991, he saw (Dr. B). Dr. B recorded an impression of acute cervical and lumbosacral spine strain with suspected herniated disc. (A later note indicates that MRIs of both areas were normal.) Dr. B left the practice after treating the claimant on intervals of once a month; claimant was reassigned to (Dr. D). Both doctors prescribed physical therapy. In September 1991, nerve conduction studies indicated that the claimant had carpal tunnel syndrome. By November 13, 1991, Dr. D recorded claimant's diagnosis as mild cervical and lumbar strain. He indicated that surgery would not be necessary, and that claimant would have to learn to live with discomfort. At that time, Dr. D also noted that physical impairment of his cervical and lumbar spine was two percent and that would be temporary.

At sometime prior to March 5, 1992, Dr. D completed a Report of Medical Evaluation (TWCC-69) which stated that claimant had not reached MMI. However, at a later date, Dr. D completed a TWCC-69 that stated that claimant reached MMI on March 6, 1992, with a two percent impairment. The claimant testified that on that date Dr. D released him to work. There are two copies of the TWCC-69 in evidence. One indicates that it was received by

the Austin office of the Texas Workers' Compensation Commission (Commission) on March 10, 1992, and subsequently by the Beaumont field office on April 3, 1992. The other copy indicates that it was received by the Beaumont field office on March 26, 1992. At the bottom, this copy indicates that copies were sent to the Commission, claimant, and claimant's attorney on March 25, 1992.

The claimant testified that in March through May 1992, he was represented by a law firm and his primary contact there was (Mr. BB), a legal assistant. He said that he went to the law firm shortly before Dr. D released him to work because he was concerned about it. He stated that he conveyed to Mr. BB that he needed more medical treatment, and Mr. BB said he would "take care of everything." The claimant went to Oklahoma around March 8, 1992, to look for work and see his child. He said that the TWCC-69 was forwarded to him sometime while he was in Oklahoma, although he could not specify the date. He said that he came back around the end of May 1992. He testified that he called the law firm nearly every day about his case. The claimant stated that in June, he talked with a disability determination officer for the Commission who told him about the "90 day rule" (Rule 130.5(e)). The claimant was not able to state when, specifically, he filed a written dispute with the Commission disagreeing with his treating doctor's certification. He stated that he did not know about the 90 day rule, and that since he still hurts, he did not feel he had reached MMI. The claimant stated that he felt that because he was hurt on the job, it was the insurance company's responsibility to take care of him.

The hearing officer took official notice of the Commission's claims file. The activity log of the file indicating contacts with the Commission shows the following:

-Claimant's file was relocated to (city) field office for April and part of May 1992.

-On May 13, 1992, claimant called and stated he was back in the Beaumont area; file transferred back.

-On June 17, 1992, the claimant called and said he needed more medical treatment; he was advised to contact his attorney.

-On July 3, 1992, claimant called and said he was under the care of a Dr. B and said he was off work, and asked if he could draw compensation. The note indicates that he was advised that he could not, unless he could get Dr. D to "rescind" his MMI and impairment rating.

-On August 11, 1992, claimant called and asked if he could get "comp," and was told that he could not because of MMI, which he only had 90 days to dispute.

Additional calls indicating dispute of MMI and impairment are logged in August and September.

-In September, a call was placed by the Commission to Mr. BB at the law firm, who stated that when percentage was given, claimant had no problems and assumed he was RTW. Mr. BB stated he could not recall telling claimant about a "dispute time limit."

A record from Dr. D dated November 1992 indicates lumbar and cervical syndrome, treatable by over-the-counter pain medication.[1] Dr. D ordered MRIs. X-rays were generally normal, with a small bone spur observed at L5. A report dated December 8, 1992 indicates MRI results revealing an early desiccation of the spine at C5-6 and C6-7, and some posterior bulges in the lumbar spine at L4-5 and L5-S1. While Dr. D states that the accident could have caused these findings or worsened a preexisting condition, no reference is made to the earlier normal MRIs. Dr. D indicates that claimant may have to learn to live with his discomfort, and that surgery is not indicated.

A December 22, 1992 letter to the Commission ombudsman indicates that these spine conditions would yield a 20% impairment. Dr. D's letter is not really responsive to questions posed by the ombudsman which seek to reconcile Dr. D's earlier finding of MMI with his December 1992 report. A short report from Dr. D, dated January 5, 1993, says that claimant "is reaching" MMI, and states that his impairment is what was conveyed to the Commission ombudsman.

We note that neither the TWCC-69, nor Dr. D's subsequent letter, attributes any impairment related to claimant's hands.

We have stated before that MMI does not mean, in all cases, that a claimant will be free from pain. Texas Workers Compensation Commission Appeal No. 93007, decided February 18, 1993. Although claimant is unfortunately still in pain, this does not rule out that MMI, the point at which further material recovery or lasting improvement can no longer reasonably be anticipated, was not reached on March 6, 1992.

However, in order for us to assess whether that first certification of MMI and impairment rating became final, or whether the claimant disputed it within the time frame set out in Rule 130.5(e), we need two critical findings of fact which are missing from the hearing

[1]This document is considered part of the record as it was erroneously excluded by the hearing officer for failure to exchange. Because the carrier was not present, no objection was lodged. We believe it was error for the hearing officer to raise, *sua sponte*, an objection, and sustain it, for failure to exchange the document with the carrier, especially when it is a medical record that may well have been forwarded to the carrier.

officer's decision. These findings are the date that the claimant was first aware of the MMI and impairment assessment so as to start the 90 day period, and the date when claimant disputed the assessment. The hearing officer found that claimant did not dispute the rating in 90 days, but there is no concrete information provided by the hearing officer to allow us to evaluate such finding. It appears that the first documented contact with the Commission that indicates a dispute over Dr. D's TWCC-69 was July 3, 1992; however, claimant testified to a June telephonic contact. Because the hearing officer determined that the date the TWCC-69 was mailed was the date from which the 90 day period should run, there is further confusion as to the 90 day period involved.

We have indicated that the date a claimant first knew about the MMI asssessment is the date that controls the beginning of the 90 day period. Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992. Also Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993. When Rule 130.5(e) is applied to finalize an impairment rating, such action should be taken based upon precise, not indefinite, findings of fact.

We accordingly reverse the decision of the hearing officer, and remand the case for further development of the evidence, as deemed necessary by the hearing officer, and for further findings of fact and conclusions of law consistent with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge